

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

STEVEN NOVICK, on Behalf of Himself and All Others  
Similarly Situated,

Plaintiff,

— against —

PROSHARES TRUST, PROSHARE ADVISORS LLC,  
SEI INVESTMENTS DISTRIBUTION CO., MICHAEL  
L. SAPIR, LOUIS M. MAYBERG, RUSSELL S.  
REYNOLDS, III, MICHAEL WACHS, and SIMON  
COLLIER,

Defendants.

CHARLES SANKOWICH, on Behalf of Himself and All  
Others Similarly Situated,

Plaintiff,

— against —

PROSHARES TRUST, PROSHARE ADVISORS LLC,  
SEI INVESTMENTS DISTRIBUTION CO., MICHAEL  
L. SAPIR, LOUIS M. MAYBERG, RUSSELL S.  
REYNOLDS, III, MICHAEL WACHS, and SIMON  
COLLIER,

Defendants.

**JAMES PAUL VALANCIUS, CRAIG FORLADER, CLINTON C. BAILIE, ADRIANA PARIZOTTO, AND BRUCE AND TEE MARSHALL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO CONSOLIDATE ALL THE ABOVE-CAPTIONED ACTIONS**

JACK MCBRIDE, on Behalf of Himself and All Others  
Similarly Situated,

Plaintiff,

— against —

PROSHARES TRUST, PROSHARE ADVISORS LLC,  
SEI INVESTMENTS DISTRIBUTION CO., MICHAEL  
L. SAPIR, LOUIS M. MAYBERG, RUSSELL S.  
REYNOLDS, III, MICHAEL WACHS, and SIMON  
COLLIER,

Defendants.

MITCHELL HIRTH, on Behalf of Himself and All Others  
Similarly Situated,

Plaintiff,

— against —

PROSHARES TRUST, PROSHARE ADVISORS LLC,  
SEI INVESTMENTS DISTRIBUTION CO., MICHAEL  
L. SAPIR, LOUIS M. MAYBERG, RUSSELL S.  
REYNOLDS, III, MICHAEL WACHS, and SIMON  
COLLIER,

Defendants.

DAVID MARCONI, on Behalf of Himself and All Others  
Similarly Situated,

Plaintiff,

— against —

PROSHARES TRUST, PROSHARE ADVISORS LLC,  
SEI INVESTMENTS DISTRIBUTION CO., MICHAEL  
L. SAPIR, LOUIS M. MAYBERG, RUSSELL S.  
REYNOLDS, III, MICHAEL WACHS, and SIMON  
COLLIER,

Defendants.

RICHARD C. BOLTON, on Behalf of Himself and All  
Others Similarly Situated,

Plaintiff,

— against —

PROSHARES TRUST, PROSHARE ADVISORS LLC,  
SEI INVESTMENTS DISTRIBUTION CO., MICHAEL  
L. SAPIR, LOUIS M. MAYBERG, RUSSELL S.  
REYNOLDS, III, MICHAEL WACHS, and SIMON  
COLLIER,

Defendants.

FENG CHEN and LIN QIAO, on Behalf of Themselves  
and All Others Similarly Situated,

Plaintiffs,

— against —

PROSHARES TRUST, PROSHARE ADVISORS LLC,  
SEI INVESTMENTS DISTRIBUTION CO., MICHAEL  
L. SAPIR, LOUIS M. MAYBERG, RUSSELL S.  
REYNOLDS, III, MICHAEL WACHS, and SIMON  
COLLIER,

Defendants.

JACOB CHENE NORMAND, on Behalf of Himself and  
All Others Similarly Situated,

Plaintiff,

— against —

PROSHARES TRUST, PROSHARE ADVISORS LLC,  
SEI INVESTMENTS DISTRIBUTION CO., MICHAEL  
L. SAPIR, LOUIS M. MAYBERG, RUSSELL S.  
REYNOLDS, III, MICHAEL WACHS, and SIMON  
COLLIER.

Defendants.

**Civil No. 1:09-cv-08200-JGK**

**Civil No. 1:09-cv-08202-JGK**

**Civil No. 1:09-cv-08327-JGK**

KAREN WORDEN, on Behalf of Himself and All Others  
Similarly Situated,

Plaintiff,

— against —

PROSHARES TRUST, PROSHARE ADVISORS LLC,  
SEI INVESTMENTS DISTRIBUTION CO., MICHAEL  
L. SAPIR, LOUIS M. MAYBERG, RUSSELL S.  
REYNOLDS, III, MICHAEL WACHS, and SIMON  
COLLIER,

Defendants.

Civil No. 1:09-cv-08662-JGK

Class members James Paul Valancius, Craig Forlader, Clinton C. Bailie, Adriana Parizotto, and Bruce and Tee Marshall (“Valancius *et al.*”) respectfully submit this memorandum in opposition to Defendants’ motion to consolidate – as opposed to coordinating, which Valancius *et al.* do not object to – the above-captioned cases into one action.

### **PRELIMINARY STATEMENT**

Defendants have moved for consolidation pursuant to Rule 42(a) of the Federal Rules of Civil Procedure of numerous class actions related to five different exchange traded funds (“ETF”) issued by ProShares Trust. These funds are:

- (1) the UltraShort Real Estate Proshares fund (“SRS Fund”),
- (2) the UltraShort Financials fund (“SKF Fund”),
- (3) the UltraShort Oil & Gas fund (“DUG Fund”),
- (4) the UltraShort Dow 30 fund (“DXD Fund”), and
- (5) the Ultra Financials fund (“UYG Fund”).

The various actions have critical differences including the fact that each fund has different benchmarks and some failed spectacularly, while others failed mildly.

Various class members have moved to be appointed lead plaintiff with respect to each ETF under 15 U.S.C. § 77z-1(a)(3)(B)(i). The lead plaintiff movant with respect to one ETF

(e.g., DUG) will not necessarily have purchased the ETF at issue in the other actions (e.g., UYG).

This Court should reject Defendants' motion because consolidation of different classes creates a conflict of interest between the classes. A better option exists to promote judicial efficiency and economy: This Court should order that the actions be coordinated for pre-trial proceedings.

### **ARGUMENT**

#### **I. Consolidation Will Create Conflicts of Interest Between the Classes**

While Rule 42(a) seeks to promote judicial efficiency, the Second Circuit has repeatedly explained that “[i]n assessing whether consolidation is appropriate in given circumstances, . . . efficiency cannot be permitted to prevail at the expense of justice-consolidation should be considered when ‘savings of expense and gains of efficiency can be accomplished without sacrifice of justice.’” *Devlin v. Transp. Commc’ns Int’l Union*, 175 F.3d 121, 130 (2d Cir. 1999) (quoting *Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1007 (2d Cir. 1995)); see also 9 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2382, at 255 (1971) (explaining that consolidation is not supposed to “merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another”).

Were this Court to consolidate the different class action, and then appoint one lead plaintiff to represent all five classes, there would be a conflict among the classes. The lead plaintiff will have purchased stock and be seeking to recover money at the expense of the other classes. A single lead plaintiff will be forced to serve five masters – in the event of settlement, or even a judgment issued after trial, there will be one finite pot of money for which the various funds will be competing. One fund will necessarily recover at the expense of another. This

creates a conflict that will prejudice members of the classes to which the lead plaintiff does not belong, or in which he suffered a *de minimis* loss.

The PSLRA requires a Rule 23(a)(3)(4) analysis before appointing lead plaintiffs. The analysis “serves to uncover conflicts of interest between named parties and the class they seek to represent.” *In re Sony SXRDRear Projection Television Class Action Litig.*, No. 06 CIV. 5173, 2008 WL 1956267, at \*13 (S.D.N.Y. May 1, 2008) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)); *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 442 (S.D.N.Y. 2006) (“Rule 23(a)(4) requires that plaintiffs demonstrate . . . that there is no conflict of interest between the named plaintiffs and other members of the plaintiff class.”) (internal quotation marks and citation omitted).

A conflict is created when there are several different lawsuits concerning the same entity, and a possibility of “competing judgments in these actions [that] Defendants could not satisfy.” *Krim v. pcOrder.com, Inc.*, 210 F.R.D. 581, 590 (W.D. Tex. 2002) (“[w]ith multiple lawsuits, more than a fair chance exists that the shareholders represented in the various suits may be different but overlapping groups of people, and their interests may not always coincide. It could be in the New York class’ best interest to settle, but not in this class’ interest”); *see also Kuper v. Quantum Chem. Corp.*, 145 F.R.D. 80, 83 (S.D. Ohio 1992). To avoid such a conflict, each potential class needs a representative to promote and guard its interests.

## **II. This Court Should Order the Cases To Be Coordinated**

There is another device that promotes judicial efficiency and economy without creating a conflict of interest: Rule 15 of the Southern District’s Rules for the Division of Business Among District Judges. This rule states:

[A] civil case will be deemed related to one or more other civil cases and will be transferred for consolidation or coordinated pretrial proceedings

when the interests of justice and efficiency will be served. In determining relatedness, a judge will consider whether (i) a substantial saving of judicial resources would result; or (ii) the just efficient and economical conduct of the litigations would be advanced; or (iii) the convenience of the parties or witnesses would be served.

S.D.N.Y. Local R. 15(a).

Rule 15 thus provides not only for the more formal “consolidation” of cases of the type seen under Rule 42(a), but also for a looser and more informal “coordination” of cases which simply enables a district judge who is familiar with the facts and issues of one case to preside over other cases that are more or less related. It would be entirely reasonable, if not prudent, for this Court to coordinate the various class actions, while appointing separate lead plaintiffs for each class.

### **CONCLUSION**

For the reasons above, Defendants’ motion to consolidate should be denied.

Dated: November 6, 2009

Respectfully submitted,

**BERNSTEIN LIEBHARD LLP**

/s/

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CERTIFICATE OF SERVICE

I, PETER ALLOCCO, hereby certify that a copy of the foregoing was served on the counsel of record listed below by regular mail this 6<sup>th</sup> day of November, 2009.

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